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Berta E. Hernandez

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INTRODUCTORY REMARKS FOR THE FOURTH PANEL

REMEDIES IN CASES OF ENVIRONMENTAL INJUSTICE

BERTA E. HERNÁNDEZ*

Last, but not least, we are going to talk about remedies in cases of Environmental Justice.

The issue of environmental justice, environmental equity, environmental racism, whichever one of the appellations we want to give it at any point in time, is a very critical one. One of the very difficult concerns environmental racism raises is that we do not necessarily always recognize it, in part because it is very difficult to recognize. It is often based upon subtleties grounded in the history of our racially segregated past. If we have difficulties recognizing problems when they are striking us in the face, it necessarily, as Professor Torres was saying during his afternoon keynote address,¹ is a much more daunting task to identify problems when they are hidden.

For example, when I was asked to moderate this panel, I just happened to have read one of Richard Delgado's articles. The piece is one of his *Rodrigo Chronicles* where he talks to this imaginary fellow—a very smart young African-American man raised and educated in Italy—who wants to get into law teaching in the United States.² This fellow wanted to teach environmental law,

* Professor of Law, St. John's University School of Law; formerly practiced with the law firms of Proskauer Rose Goetz & Mendelsohn and Milgrim Thomajan & Lee P.C., and the U.S. Department of Justice, Antitrust Division; member of the Commission on Judicial Nomination of the State of New York, the Eastern District Magistrate Judge Merit Selection Panel, and the American Arbitration Association. B.A., Cornell University; J.D., Albany Law School of Union University; L.L.M., New York University. Professor Hernández has authored articles that have appeared in the *New Mexico Law Review*, the *American University Law Review*, the *North Carolina Journal of International Law*, and the *Columbia Human Rights Law Review*.

¹ See Gerald Torres, *Keynote Address: Changing the Way Government Views Environmental Justice*, 9 ST. JOHN'S J. LEGAL COMMENT. 543 (1994).

² Richard Delgado, *Rodrigo's Sixth Chronicle: Intersections, Essences, and the Dilemma of Social Reform*, 68 N.Y.U. L. REV. 639 (1993).

and their conversation—Rodrigo's and Richard's—addressed the notion of how do we know that environmental justice exists and how do we identify that the basis of environmental injustice exists when it exists? Which comes first, "the chicken or the egg," if we use the proverbial expression.

What they were specifically addressing was the task of selecting neutral criteria to decide the placement or location of boundaries or margins; neutral ways in which to decide where to place a facility—a road for example—or where to designate school district lines; decisions that because of their nature could have racially identifiable consequences and thus raise environmental justice issues. In particular, Rodrigo and Richard were discussing the creation of school districts based on an existing road as ostensibly a racially-neutral marker. We are not going to set school district margins by communities—we have learned that is problematic; let us rather just pick "X" highway. Is that okay as far as generating fair results? When in their conversation, they started to dig beneath the surface, what became very clear was that the apparent neutral delineation was anything but neutral. To analyze carefully, we have to go back to when the road was put in there and how it was decided that that was where the road was to be.⁶

Certainly a road was not going to go through the center of an upscale neighborhood, if you will. Thus the "neutral" line was anything but. So the issues sometimes are very patent, sometimes are very latent, and in dealing with those issues which are often very difficult to pick out, even with the new regulations put out by the government that make environmental injustice an issue, we still have to ask questions, even when ostensibly neutral standards are being put forth to us.

Thus, in looking at remedies, I thought there were some questions that I would pose to the panel at the outset, that in the course of their comments, perhaps they could address. For example, the basic: What is now available, and is it really available? What can communities do to prevent the problems? Do communities have to wait for people like Hazel Johnson to ask people to chain themselves to trucks before courts will listen?³ How dramatic must we get? How drastic must the evidence be to reflect the real impact on groups of people, sometimes disproportionately

³ See Hazel Johnson, *A Personal Story*, 9 ST. JOHN'S J. LEGAL COMMENT. 513 (1994).

so, of certain acts? What about fair share legislation, what exactly does that mean? In New York or, as mentioned earlier, in Louisiana,⁴ is that an appropriate remedy, is that a sufficient remedy?

In thinking of this, I remember a meeting at the local school just three blocks away from my house where the community was up in arms because we had done enough—we had reached the “tipping-point”. One more house for mentally handicapped people, and one more house for single mothers is just going to tax our school system too much. The whole community was packed into the very school’s auditorium that was going to be taxed excessively in order to protest new facilities, and they were all getting along okay. Are those standards appropriate; are available remedies sufficient; if not, what are we to do? And what about the civil rights remedies, are they effective? Will disparate impact claims survive Title VI? They have not done so well of recent with respect to Title VII. Do we need to show specific intent, or is the disparate impact going to be enough in this context? Finally, the question that was addressed at length earlier: Is it really race or is it economics,⁵ how do we discern and how do we remedy those different possibilities?

⁴ See Richard Kleiner, *Quality of Life: Justice Equates Fairness*, 9 ST. JOHN’S J. LEGAL COMMENT. 519 (1994).

⁵ See David L. Gregory, *Racism or Economics?*, 9 ST. JOHN’S J. LEGAL COMMENT. 439 (1994).

